

Newton (Migration) [2017] AATA 1834 (20 September 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Shannen Newton
CASE NUMBER:	1616878
DIBP REFERENCE(S):	BCC2015/2025822
MEMBER:	David Barker
DATE:	20 September 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(a) of Schedule 2 to the Regulations • cl.820.221 of Schedule 2 to the Regulations.

Statement made on 20 September 2017 at 7:13am

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Genuine and continuing relationship – Living together on a permanent basis – Shared financial contribution to household – Child born of the relationship – Support for ill family member – Undertaking joint social activities

LEGISLATION

1. *Migration Act 1958*, ss 5F, 65
Migration Regulation 1994, Schedule 2 cl 820.211, cl 820.221, r 1.15A

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision of a delegate of the Minister for Immigration on 22 September 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 15 July 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 or cl.820.221 cl.820.211.
5. The applicant appeared before the Tribunal on 7 September 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and from the sponsor's mother, Ms Valerie Newton.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

7. BACKGROUND

8. The applicant is a Papua new Guinea (PNG) national and is 30 years old.
9. The sponsor was born in Australia and is 53 years old
10. The parties claim to have met in November 2007 in Port Moresby, PNG. They claim to have commenced a relationship and started living with each other in February 2009.
11. The applicant gave birth to the parties' first child, Liam James Newton, on 15 September 2012 in Port Moresby, PNG.
12. Liam James Newton was granted Australian citizenship, by descent, on 17 April 2014.
13. The parties were married in Putney, NSW on 5 July 2015.
14. In the decision record, a copy of which the applicant provided to the tribunal, the delegate stated they were satisfied the parties were legally married, but noted they had not provided any other evidence of mutual commitment, obligation, companionship, emotional support and long term planning.
15. Prior to the hearing the applicant provided information to the Tribunal including but not limited to the following: written statements from the applicant and the sponsor, documents pertaining to the parties and Master Liam's identities, financial records, photographs and witness support statements.
16. Following the hearing the applicant provided the Tribunal with account statements from a St George Bank account covering the period from August 2016 to September 2017.

CONSIDERATION OF CLAIMS AND EVIDENCE

17. The issue in the present case is whether the applicant and her sponsoring partner were in a genuine spousal or de facto relationship at the time of application and at the time of this decision.
18. In making its findings, the Tribunal has considered the documents contained in the Department and Tribunal files and oral evidence provided by the applicant, sponsor and witness at the hearing. The Tribunal has the benefit of considerably more evidence than was available to the Department at the time of the delegate's decision.
19. The parties' oral evidence regarding the circumstances in which they met, the development of their relationship and their current living circumstances was consistent and credible. Their oral evidence during the hearing was also consistent with the documentary evidence provided with the visa and review applications. The Tribunal found the parties to be credible witnesses who gave their evidence in a calm, rational manner without embellishment. The tribunal noted the applicant is unrepresented and has not at any stage had the assistance of a migration agent in relation to her visa application. The tribunal is satisfied neither the applicant or sponsor have a sophisticated understanding of Australian migration procedures and this is a factor which influenced the paucity of evidence provided to the Department at the time of the visa application.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

20. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
21. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

22. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The tribunal has reviewed a copy of a NSW Births Deaths and Marriages – marriage Certificate, which states the parties married in Putney, NSW on 5 July 2015, which was provided with the visa application.
23. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

24. *Inception and development of the relationship*

25. The parties gave a plausible account of how they met in Port Moresby in 2007, whilst the sponsor was working in the construction industry in that country. The applicant said the commenced a relationship not long after their initial meeting. She said she found the sponsor to be a responsible, gentle man who was in stable employment. She said she found these characteristics in him were attractive to her. She said she moved in with the applicant and they cohabited in Port Moresby until the sponsor's construction work wound down. The applicant gave evidence she gave birth to the parties' first child, Liam, in 2012 and that Liam was granted Australian citizenship in 2014.
26. The applicant said she had travelled to Australia on a number of occasions, along with the sponsor, since they commenced their relationship. She said she was advised by the Department in 2014 that she should stop travelling to Australia on Visitor visas and should instead apply for a Partner visa. The applicant said around that time she and the sponsor intended to continue to reside in PNG, but saw the logic in her getting a Partner visa. She said they initially intended to apply for the visa from PNG, but had to remain in Australia for much longer than expected in 2014, when the sponsor's mother fell seriously ill a few days after they arrived for a short term visit. The applicant said they had to remain with the sponsor's elderly mother and look after her and that this led to her applying for the partner visa from within Australia.
27. The applicant said the parties were married in 2015 and, more recently, have moved into their own accommodation due to an improvement in the health of her mother-in-law.

28. *Financial aspects of the relationship*

29. The parties gave consistent evidence they both contributed to regular expenses until she fell pregnant with Liam in 2012, whilst they were living in PNG. The parties told the tribunal the applicant has been reliant on financial support from the sponsor since that time, both whilst they were in PNG and since they have been together in Australia on an ongoing basis.
30. The oral evidence provided by the parties during the hearing is consistent with the information in the written submissions provided with the review application. The Tribunal has reviewed the bank statements and other financial records which were provided with the review application and finds they corroborate the parties' oral evidence with respect to the financial aspects of their relationship.
31. The Tribunal has considered all of the evidence that is currently available and is satisfied that the financial aspects of the parties' relationship are consistent with those of a couple in a genuine and continuing relationship.

32. *Nature of the household*

33. The Tribunal accepts on the basis of the evidence before it that the parties have lived together or not separately and apart on a permanent basis, since the applicant moved in with the sponsor in Port Moresby, PNG in February 2009. The tribunal accepts the parties' initially stayed with the sponsor's mother in Mitchell road, Putney, NSW after their arrival in Australia in 2014 and that they moved to privately rented accommodation in Belmore Street, Ryde approximately six months ago.

34. The parties gave consistent evidence they have a very traditional distribution of roles within their household, whereby the applicant does all the cooking, cleaning and provides the majority of care to their son, Liam. They gave consistent evidence they are comfortable with this arrangement, as it is the responsibility of the sponsor to 'earn the money'. The Tribunal accepts the applicant has since her mother-in-law fell ill in 2014, provided her with a substantial level of support and care.
35. The Tribunal found the evidence provided by the parties with respect to who does what within their household quite plausible and is satisfied it reflects the circumstances of their relationship. Accordingly, the Tribunal accepts the parties had, at the time of application and at the current time, established a shared household in which they live with their child, Liam.

36. *Social aspects of the relationship*

37. On the basis of the oral evidence of the parties, available witness statements and the oral evidence of Ms Valerie Newton, the Tribunal finds that the relationship between the applicant and her sponsor is recognised and supported by the sponsor's family and the parties' friends.
38. The Tribunal has reviewed the photographs provided with the review application. The Tribunal is satisfied the photographic evidence shows the parties together and in the company of family and friends at various points in their relationship.
39. Based on the available evidence the Tribunal is satisfied that the applicant and her sponsor jointly plan and undertake social activities involving themselves and their child and represent themselves to other people as being in a committed relationship. The Tribunal is also satisfied that in the opinion of the sponsor's family and friends, the parties are in a genuine relationship.

40. *Nature of the persons' commitment to each other*

41. The Tribunal finds that the applicant and her sponsor have been in a committed relationship since February 2009. The Tribunal accepts the parties have a commitment to supporting each other, their child and their wider familial responsibilities.
42. The Tribunal is satisfied the parties see their relationship as stable, mutually supportive and long-term. The Tribunal considers the parties' evidence with regard to their commitment to each other to be plausible, persuasive and sincere.
43. The extent to which the parties support each other and are committed to the welfare of each other provides significant weight in support of a finding that they are in a genuine and continuing spousal relationship.

44. *Conclusions on spouse criteria*

45. Having regard to all the circumstances of this relationship, the Tribunal is satisfied that the applicant and her sponsor married on 5 July 2015 and they are in a genuine and continuing relationship, that they have a mutual commitment to a shared life to the exclusion of all others, and that they live together, or not separately and apart, on a permanent basis, both at the time of application, and at the time of decision.
46. The Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship. The applicant's sponsor has turned 18 years of age and therefore satisfies the criteria in cl.820.211(2)(c). Therefore the applicant meets cl.820.211(2)(a) and cl.820.221.

47. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

48. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(a) of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations

David Barker
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).